

FILED

MAR 14 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

WILFRED RAPHAEL,

Plaintiff - Appellant,

v.

DONALD R. ROBERTS; et al.,

Defendants,

and

DAVID H. HENDERSON,

Defendant - Appellee.

No. 04-35454

D.C. No. CV-04-00035-A-JKS

MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska
James K. Singleton, District Judge, Presiding

Submitted March 8, 2006**

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: CANBY, BEEZER, and KOZINSKI, Circuit Judges.

Wilfred Raphael appeals pro se from the district court's judgment dismissing, for failure to state a claim, his civil rights action against his former attorney, a state court judge, and other defendants. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo, *see Huftile v. Miccio-Fonseca*, 410 F.3d 1136, 1138 (9th Cir. 2005), and we may affirm on any ground supported by the record, *see Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). We affirm.

The district court properly determined that Raphael could not state a claim because Henderson was not a state actor and the judge was protected by judicial immunity. *See Simmons v. Sacramento County Sup. Ct.*, 318 F.3d 1156, 1161 (9th Cir. 2003).

Because Raphael was not a prisoner at the time he filed his action, the district court should not have dismissed his action pursuant to 28 U.S.C. § 1915A. We nevertheless affirm because dismissal was proper pursuant to Fed. R. Civ. P. 12(b)(6). *See Omar v. Sea-Land Service, Inc.*, 813 F.2d 986, 991 (9th Cir. 1987) (holding that a district court may dismiss sua sponte pursuant to Federal Rule of Civil Procedure 12(b)(6) when the claimant cannot possibly win relief).

Raphael's remaining contentions lack merit.

AFFIRMED.